

STATE OF MICHIGAN
COURT OF APPEALS

JANELL BOWDEN and GARY BOWDEN,

Plaintiffs-Appellants,

v

CHARLES P. GANNAWAY, STEVEN J.
POLLOK, and RAPAPORT POLLOK FARRELL
& WALDRON, PC,

Defendants-Appellees.

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No. 319047
Ingham Circuit Court
LC No. 11-000302-NM

Advance Sheets Version

Before: WILDER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

In this attorney-malpractice claim, plaintiffs appeal as of right an order of the trial court granting defendants' motion for summary disposition. The court found as a matter of law that defendants' alleged professional negligence was not a proximate cause of plaintiffs' alleged injuries. We affirm.

Plaintiff Janell Bowden worked for the state of Michigan from 1980 until 2007. For most of that time she worked in the motor pool, cleaning and preparing vehicles for use by state employees. She began to have problems with her upper torso in the 1990s, especially her right shoulder, arm, and hand, and underwent several surgeries to fuse her spine and remove bone spurs. In 2001, she began working at the state motor pool as a "storekeeper," signing cars in and out of the motor pool, preparing paperwork to terminate leased cars, and preparing work orders. The job was created for her in order to accommodate the physical restrictions recommended by her physicians.

In May 2008, Janell Bowden filed an application with Michigan's Office of Retirement Services (ORS) for non-duty-related disability retirement benefits, alleging that constant cervical pain resulting from these surgeries had limited her ability to use her right arm and hand. The physician designated by the state to examine her application and medical records, including numerous assessments by her physicians stating that she was disabled, concluded that she was not totally and permanently disabled and that she "should be able to return to her past job"

In a letter dated August 1, 2008, the ORS denied her application and informed her that she had 60 days from the date of the letter to appeal the decision. She engaged attorney Charles Gannaway (a defendant in this case) to represent her on appeal. However, the appeal was not filed timely.

In a November 2008 request to the ORS, Gannaway asked for an appeal hearing, explaining that his request was untimely because of a misfiling of the ORS's decision, but stating that he was making the request anyway "due to just cause." On December 1, 2008, the ORS denied the untimely request for a hearing. Gannaway then filed an unsuccessful petition with the circuit court, asking it to reverse the denial and award Janell Bowden non-duty-related disability retirement benefits. In March 2009, he informed Bowden by letter that he had missed the deadline for filing the appeal, that the ORS had denied his request for a hearing, and that he had filed a petition with the circuit court.

Plaintiffs filed a professional negligence suit against defendants in which they sued for both economic and noneconomic damages.¹ The claim was based on the failure to file a timely appeal of the ORS denial of the non-duty-related retirement benefits. Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). They argued that the failure to file the appeal with the ORS was not a proximate cause of any damage to plaintiffs. They cited *Polania v State Employees' Retirement Sys*, 299 Mich App 322; 830 NW2d 773 (2013), to support their argument that even if the appeal had been filed in a timely manner, Janell Bowden would have been unsuccessful because no medical advisor had certified in writing that she was totally and permanently disabled. Plaintiffs argued that a retroactive application of *Polania* was erroneous, contending that before *Polania*, the hearing officer would have looked beyond a medical advisor's disability statement and considered all the evidence, including assessments offered by Janell Bowden's physicians stating that she was disabled.

The trial court concluded that *Polania* did not establish new law; rather, it discerned the intent of the Legislature through analysis of the plain language of the disability statute, which had remained the same since its 2002 enactment. Because Janell Bowden did not meet the requirements of the disability statute, the court concluded, she would not have prevailed on her underlying claim and, therefore, plaintiffs could not prevail on their legal malpractice claim. The trial court granted defendants' motion, and plaintiffs argue the court erred by doing so. We review de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2002).

The elements of a legal malpractice action are as follows:

"(1) the existence of an attorney-client relationship;

¹ Plaintiffs' claim against defendant Steven Pollok arose from his handling of Janell Bowden's workers' compensation claim. Their claim against defendant Rapaport Pollok Farrell & Waldon, P.C., was based on a theory of respondeat superior. Plaintiffs stipulated the dismissal of those claims with prejudice.

“(2) negligence in the legal representation of the plaintiff;

“(3) that the negligence was a proximate cause of an injury; and

“(4) the fact and extent of the injury alleged.” [*Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994) (citation omitted).]

To prove proximate cause, a plaintiff “must show that *but for* the attorney’s alleged malpractice, he would have been successful in the underlying suit.” *Id.* at 586 (quotation marks and citation omitted). This “suit within a suit” concept applies when “the alleged negligent conduct involves the failure of an attorney to properly pursue an appeal.” *Id.* at 587. In those cases, the plaintiff must prove that “the attorney’s negligence caused the loss or unfavorable result of the appeal” and that “the loss or unfavorable result of the appeal in turn caused a loss or unfavorable result in the underlying litigation.” *Id.* at 588. Whether a plaintiff would have prevailed in the underlying appeal is a question of law. *Id.* at 589.

In order to prevail in their legal malpractice claim, plaintiffs had to show that, but for the failure to timely appeal the denial of Janell Bowden’s application for non-duty-related disability retirement benefits, she would have been awarded the benefits. MCL 38.24 governs the award of those benefits to qualifying state employees. MCL 38.24(1) states:

[A] member who becomes totally incapacitated for duty because of a personal injury or disease that is not the natural and proximate result of the member’s performance of duty may be retired if all of the following apply:

(a) The member . . . files an application . . . with the retirement board no later than 1 year after termination of the member’s state employment.

(b) A medical advisor conducts a medical examination of the member and certifies in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that the member should be retired.

(c) The member has been a state employee for at least 10 years.

Plaintiffs argue that before *Polania*, an appeal of the ORS’s denial of Janell Bowden’s application would have been governed by *Gordon v Bloomfield Hills*, 207 Mich App 231, 232; 523 NW2d 806 (1994), which required a reviewing court to “consider all the evidence on the record, not just that supporting the agency’s decision.” Had Gannaway filed a timely appeal, plaintiffs argue, a review of the “whole record” would have resulted in reversal of the denial because assessments from several independent physicians clearly established the disability.

Contrary to plaintiffs’ insistence, this matter does not involve the question of the retroactive application of a new rule or principle. We would note preliminarily that the statute that the *Polania* Court interpreted was a statute in effect at the time of the decision. The 2002 amendments of MCL 38.24 used the unambiguous word “all” when setting forth what conditions must be met before the retirement board may consider a member for non-duty-related disability retirement. 2002 PA 93. As the trial court noted, *Polania* did not establish a new rule or

principle. Rather, it discerned the Legislature's intent from the plain language of MCL 38.24, which had been in effect for five years before the time Janell Bowden should have appealed the ORS denial of her disability application. From the time of its amendment in 2002, MCL 38.24 has meant that for an applicant to be eligible to receive a non-duty-related disability retirement, a medical advisor had to certify the applicant as totally and likely permanently disabled. MCL 38.24(1)(b). *Polania* clarified, not introduced, this requirement.

It is undisputed that the medical advisor had not certified Janell Bowden as totally and permanently disabled and that without the certification she was ineligible for benefits under the plain language of MCL 38.24(1)(b). Therefore, because plaintiffs cannot establish that Janell Bowden would have prevailed had Gannaway filed a timely appeal of the initial denial of her application for benefits, plaintiffs cannot show that Gannaway's negligence was a proximate cause of their alleged damages, and, consequently, the trial court did not err by dismissing their claim.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens